No. 10,488

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE ROBERT GUTMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

The trial Court had jurisdiction under an indictment charging violation of the following section:

50 USCA 311.

This Court has jurisdiction under Section 128 (a) of the Judicial Code as amended by Act of February 15, 1925. (28 USCA 225.)

STATEMENT OF THE CASE.

George Robert Gutman, the appellant, was indicted by the Grand Jury for the Northern District of California, Southern Division, in the March 1943 term.

The indictment charged appellant with a violation of the "Selective Training and Service Act of 1940,

as Amended'' 50 USCA 311, in that he failed to report for induction into the Land or Naval Forces of the United States. (Tr. pp. 2-3.)

To the indictment in question the appealing defendant entered a plea of not guilty. (Tr. p. 4.)

The appellant was found guilty by a jury of the charge contained in the indictment. (Tr. p. 5.)

The appellant was sentenced by the trial Court to imprisonment in a U. S. Penitentiary for a period of three years. (Tr. pp. 6-7.)

At the conclusion of the government's case in chief, appellant moved the Court for an instructed verdict of not guilty on the grounds that the evidence was insufficient as a matter of law to sustain a conviction, which motion was denied and to which denial an exception was taken. (Tr. p. 74.)

At the conclusion of defendant's case and of all the testimony, appellant renewed his motion for an instructed verdict of not guilty on the ground that the evidence was insufficient as a matter of law to sustain a conviction, which motion was denied and to which denial an exception was taken. (Tr. pp. 108-9.)

At the close of the evidence and after argument of counsel the Court charged the jury, that in Class I-A shall be placed every registrant who is found available for general military service, that the decision of the local draft board in classifying registrant is final except where an appeal is authorized and that in the event of such appeal to the Appeal Board that the decision of the Appeal Board is final, that the jury

was not to decide whether or not registrant, the appellant, is or is not a minister, that such decision rested entirely with the local draft board and the Board of Appeal, that the only question which the jury was to determine was as to whether appellant ignored the draft board's orders to report for induction. (Tr. pp. 111-112.) Appellant duly objected and excepted to the said charge to the jury. (Tr. p. 117.)

The appellant duly requested the Court to charge the jury that if the jury found that appellant was a regular minister of religion that it should acquit the defendant (appellant), that if the draft board in classifying appellant acted arbitrarily and capriciously and failed to accord him a hearing upon his application for exemption as a minister, then the jury should acquit the defendant (appellant), that if the jury found that the draft board had not investigated appellant's claim as a minister in the manner required by Opinion 14 of the National Director of Selective Service, then it should acquit the appellant. (Tr. pp. 117-119.) That upon the Court's refusal to give said instructions, appellant duly excepted. (Tr. pp. 118-119.)

After the verdict and sentence as herein stated, the appellant duly filed a notice of appeal accompanied by the grounds relied upon. (Tr. pp. 7-9.) There was timely settled and allowed by the Court the Bill of Exceptions. (Tr. pp. 121-122.) And the assignment of errors was duly filed within the time set by the trial Court. (Tr. pp. 124-129.)

SUMMARY OF THE EVIDENCE.

Appellant testified that he was a minister of a Christian Society, known as "Jehovah's Witnesses"; that he had been engaged in full time service as a minister for about four years; that he had been a "Special Pioneer" since May 1, 1942; that his first assignment to work for the Society was in August, 1939, when he was sent to Paso Robles, California, where he organized Bible studies and he did no secular work; that he subsequently worked as a minister in various communities in California and in Utah, Wyoming, Kansas and various other states; that his work as "Special Pioneer" consisted in devoting at least 175 hours per month to the preaching of the gospel. (Tr. pp. 77-80.)

A purported Certificate of Ordination was admitted in evidence marked Defendant's Exhibit B and so far as pertinent hereto, reads as follows:

> "Watchtower Bible and Tract Society.
> 117 Adams Street,
> Brooklyn, New York. Sept. 8, 1942.
>
> To Whom it May Concern: This is to certify that George Robert Gutman, one of Jehovah's Witnesses, has been associated with the Watchtower Bible and Tract Society, Inc., according to our records, since July 1939. He was baptized in July 1939, and was appointed direct representative of this organization to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the Gospel of the Kingdom of God in definitely assigned territory on August 8, 1939.

Mr. Gutman's entire time is devoted to missionary work.

He has the Scriptural ordination to preach 'this Gospel of the Kingdom'. He is therefore, declared by this Society a duly ordained minister of the Gospel and is authorized to represent this Society and preach 'this Gospel of the Kingdom'.

Watchtower B. & T. Society, Inc.,
T. J. Sullivan,
Superintendent of Evangelists."

(Tr. pp. 78-79.)

Verne G. Reusch testified that appellant was a "Special Pioneer" in the Society of Jehovah's Witnesses; that this term refers to the ultimate group in the Society; that they hold services comparable to what are known as religious services in other religions; that appellant is recognized in the Society as a minister; that he considered that the draft board acted unfairly in classifying appellant. (Tr. pp. 74-75.)

C. D. Easter testified that appellant was a "Special Pioneer" in the Society of Jehovah's Witnesses; that he believed that appellant might well have considered it treason to Almighty God, for him to go into the army; that having consecrated himself to the "kingdom" for him to violate that consecration would make him guilty of treason to God. (Tr. p. 76.)

The appellant filed the usual draft questionnaire with his local draft board, on September 11, 1942, in which he asserted his claim as a minister and stated that he believed he should have a classification of 4-D.

(Tr. pp. 13-33.) On November 23, 1942 the local board placed appellant in the classification I-A. Thereafter and on December 10, 1942 the board notified appellant of this classification. (Tr. p. 43.) At the time of filing his questionnaire, appellant had also filed with the board a lengthy statement supporting his claim as a minister. (Tr. p. 35.) And in which he set forth in detail the evidence in support of his claim. (Tr. pp. 36-43.) On November 23, 1942, appellant wrote a letter to the board in which he again emphasizes his claim and calls the board's attention to Consolation Magazine of July 9, 1941, which he sends to the board, and which magazine contained a copy of the opinion of General Hershey concerning classification of members of Jehovah's Witnesses. Appellant also states in his letter the reason why his name did not appear on the certified official list of pioneer ministers of Jehovah's Witnesses, namely, that he was not old enough to be on it as originally issued and that before his name could be added National Headquarter's of Selective Service had discontinued the practice of adding names and made the question of determining who is a minister, a question of fact to be decided in each case. (Tr. pp. 44-45.)

Within 10 days of the notice from the local board that appellant had been classified as I-A and on December 17, 1942, appellant wrote a letter to the local board requesting a personal hearing before the board and calling the board's attention to a certificate of ordination which he had filed in support of his claim. (Tr. p. 46.)

On December 21, 1942 appellant's purported hearing was had before the local board and same lasted "not less than five minutes". (Tr. p. 65.) The chairman of the local board, Mr. Gillin, testified, that the board considered his ordination certificate and all the other evidence that he had presented. He also testified that prior to this hearing he had a "scuffle" with appellant in the office of the draft board and that he had thereafter and on the basis of this "scuffle" secured the arrest and conviction of appellant in the Municipal Court. (Tr. pp. 66-67.) Appellant testified in reference to this purported hearing that the hearing "did not last more than five minutes"; that he told Mr. Gillin that he came for a hearing and wished to discuss his classification; that Mr. Gillin replied by merely asking appellant if he wanted to appeal; that the board asked him nothing about his work; nothing concerning his claim as a minister or his relationship to Jehovah's Witnesses. (Tr. pp. 91-93.) Appellant further informed the board that he had certain other evidence which he wished to present, but the answer of the board was the same: Do you want to appeal? (Tr. p. 91.)

On December 21, 1942, appellant filed an appeal from the decision of the local board to the board of appeals. (Tr. p. 34.) And at the same time addressed a letter to the local board in support of his appeal, in which he again set forth his claim to classification as a minister. (Tr. pp. 47-49.) On February 10, 1943 the appeal board affirmed the appeal. (Tr. p. 34.) Thereafter appellant wrote letters to both the State

Headquarters and the National Headquarters of Selective Service, seeking recognition of his claim and therewith submitting additional affidavits in support of same. (Tr. pp. 81-90.)

Appellant received no affirmative results from his appeal to State and National Headquarters and thereafter was ordered to report for induction into the armed forces, with which order he did not comply. That thereafter he was sent a notice of delinquency, to which he replied that he could not report as he was an ordained minister of the gospel. (Tr. pp. 61-65.)

There was also admitted in evidence at the trial as Defendant's Exhibit D, Opinion No. 14 as Amended, of the National Director of Selective Service. (Tr. pp. 99-104.)

SPECIFICATION OF ERRORS RELIED UPON.

The Court erred in denying the motion of defendant for a directed verdict of acquittal on the ground that the evidence was insufficient as a matter of law to sustain a conviction, made at the conclusion of the testimony on behalf of the United States and renewed at the conclusion of all the evidence. (Assignments of Error I and II, Tr. pp. 124 and 125.)

The Court erred in giving to the jury, over defendant's objection, an instruction that "In Class I-A shall be placed every registrant who is found available for general military service, and such registrant shall be liable for induction into the armed forces of

the United States". (Assignment of Error III, Tr. p. 125.)

The Court erred in giving to the jury, over defendant's objection, the following instruction: "I instruct you that the local boards, under rules and regulations prescribed by the President shall have power, within their respective jurisdictions to hear and determine, subject to the right to appeal to appeal boards therein authorized all questions of claims with respect to inclusion for or exemption for deferment from training and service under the Selective Training and Service Act of 1940, as amended, of all individuals within the jurisdiction of such local board. The decision of such local board shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." (Assignment of Error IV, Tr. pp. 125 and 126.)

The Court erred in giving to the jury, over defendant's objection, the following instruction: "I instruct you that each board of appeals shall have jurisdiction to review any decision concerning classification of the registrant by any local board in the area of the board of appeals, provided such an appeal has been filed with the local board. Such appeal must be taken within 10 days after the date when the local board mails to the registrant notice of classification, and the decision of the board of appeals shall be final unless modified or reversed by the President." (Assignment of Error V, Tr. p. 126.)

The Court erred in giving to the jury, over defendant's objection, an instruction that "You as jurors are not to decide whether the defendant is or is not a minister of religion. What you are to determine is whether the defendant after classification intentionally ignored the draft board's orders to report for induction". (Assignment of Error VI, Tr. p. 127.)

The Court erred in refusing to give to the jury an instruction that "If you find that the defendant is a regular minister of religion in the Society of Jehovah's Witnesses, or if you have reasonable doubt as to whether the defendant was a regular minister in the Society of Jehovah's Witnesses, then you must acquit the defendant". (Assignment of Error VII, Tr. p. 127.)

The Court erred in refusing to give to the jury an instruction that "If you find or have reasonable doubt as to whether the draft board acted arbitrarily and capriciously and failed to accord the defendant a hearing upon his application for deferment as a regular minister of religion in accordance with Section 625.2 of the Selective Service Regulations then you should acquit the defendant". (Assignment of Error VIII, Tr. pp. 127 and 128.)

The Court erred in refusing to give to the jury an instruction that "If you find or have reasonable doubt as to whether the draft board failed to consider or investigate in the manner required by Opinion No. 14 of the National Director of Selective Service

whether the defendant stood in his relationship to the members of the Society of Jehovah's Witnesses in the same relationship as a regular minister of other religions, then you should acquit the defendant''. (Assignment IX, Tr. p. 128.)

ARGUMENT.

I. THE COURT ERRED IN DENYING THE MOTION OF DEFENDANT FOR A DIRECTED VERDICT OF ACQUITTAL ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION. (Assignments of Error I and II, Tr. pp. 124 and 125.)

The assignments of error contained in assignments I and II may be treated under one heading since they both relate to the sufficiency of the evidence to sustain the conviction.

The evidence is wholly insufficient to sustain a conviction for the reason that the undisputed evidence showed that appellant is in fact a minister and that the draft board acted arbitrarily and capriciously in classifying him as I-A and that this action of the board and its failure to follow the prescribed procedure under the draft regulations resulted in its failure to acquire the jurisdiction or power to make an effectual order of induction.

The Selective Training and Service Act of 1940, Section 5 (d) (50 USCA Appendix 305 d) provides that: ''Regular or duly ordained ministers of religions * * * shall be exempt from training and service (but not from registration) under this Act''. Sec-

tion 622.44 of the Selective Service Regulations provides for placing all ministers in Class IV-D.

It is to be noted that such persons are not to be *deferred* but are to be *exempted.* Once it is established that the person falls within the exempted class, he is then not subject to the orders of the draft board.

Wise v. Withers, 3 Cranch 331. Case involved a justice of the peace. Under the then militia act a justice of the peace was exempt from enforced enrollment. For failure to submit to induction he was arrested, fined and his goods seized by a court martial. He subsequently sued the army officers for trespass. Said Chief Justice Marshall:

> "It follows from this opinion that a court martial has no jurisdiction over a Justice of the Peace as a militiaman; he could never be legally enrolled; and it is a principle that a decision of such a tribunal in a case clearly without the jurisdiction cannot protect the officers who executed it. The Court and the officers are all trespassers."

In *Angelus v. Sullivan,* 246 Fed. 54 (Circuit Court, 2nd Circuit), involving the Draft Act of 1917, the Court apparently approved this language of counsel, after citing the above case of *Wise v. Withers*:

> "No difference in principle between the two cases exists, namely, that the person attempted to be drafted is not subject to the Draft Act; and therefore nothing which is done with respect to him is valid."

The task of determining in the first instance, who is exempt, rests with the draft board. (Although there

is certainly room for argument that the statute making a minister exempt is so absolute in its terms that a registrant might establish the fact of his ministry in any suitable proceedings and without waiting for a decision by the board.) But the draft board does not have arbitrary power and cannot act arbitrarily or capriciously; nor without evidence nor in opposition to the evidence; nor can it decline to hear the person seeking the exemption.

In the *Angelus* case, supra, the Court said:

> "We think a decision of the Board is final only where the board has proceeded in due form and where the party involved is given a fair opportunity to be heard and to present his evidence. But if an opportunity to be heard should be denied, there can be no doubt as to the right of the aggrieved party to come into the courts for the protection of his rights."

To the same effect see, *Boitano v. District Board,* 250 Fed. 812, and *U. S. v. Kinkead,* 250 Fed. 692.

In *Johnson v. United States,* 126 Fed. (2d) 243 (8th Circuit), the Court in referring to the draft board, said:

> "But classifications by such agencies must, under the powers given them by Congress, be honestly made, and a classification made in the teeth of all the substantial evidence before such agency is not honest but arbitrary. Courts can prevent arbitrary action of such agencies from being effective."

In the present case it is fully established that the appellant is in fact a minister; that he has been such for a period of about four years, his ministry even antedating the Draft Act; that he works full time at his ministry and has no other employment; that he was ordained by the Watchtower Bible and Tract Society of New York as a direct missionary representative of them on August 8, 1939; that this organization is recognized by national headquarters of selective service as a religious institution; all of these facts appellant established beyond cavil before the draft board; there was no opposing evidence. By all the rules of evidence and fair play, appellant was entitled to be classified as a minister (IV-D), instead he was classified as I-A and thus made subject to induction into the armed forces. The board thus acted arbitrarily and capriciously and in the teeth of all the evidence and by so doing lost its jurisdiction to make the order of induction.

Not only did appellant prove his claim by ample evidence in the first instance, but, after the local board had arbitrarily rejected all his proof and had classified him, capriciously, in Class I-A, he pursued his administrative remedy by demanding a personal hearing before the local board, pursuant to Regulation 625.1, which provides that "Every registrant * * * shall have an opportunity to appear in person * * *" Rule or Regulation 625.2 provides that at such hearing the registrant may discuss his classification, may point out the class in which he thinks he ought to be classified, may direct the board's attention to particular

evidence and may present such further evidence as he deems suitable.

As concerns this hearing, what does the evidence show? Simply this: That appellant appeared before the board with some additional evidence which he sought to read and also informed the board that he wished to discuss his classification. These things he had an unquestioned right to do; but the board replied through its chairman, with the inane and irrelevant question: Do you want to appeal? And it should be recalled that it was this same chairman, the spokesman for the board, who had previously had a physical encounter with the appellant and who had caused the arrest of the appellant. The whole alleged hearing consumed about five minutes. It is obvious that this alleged hearing was no hearing in contemplation of law, but was simply a farce. And this failure to accord appellant a hearing in conformity with the regulations was a failure to accord him due process of law, which in turn prevented the board from ever acquiring the jurisdiction to issue an order of induction. And its order of induction thereafter issued was void and could give no basis for an indictment.

Where the regulations provide for a personal hearing, such hearing is a part of due process.

St. Joseph Stockyards Co. v. U. S., 298 U. S. 38;

Yamatoya v. Fisher, 189 U. S. 86;

U. S. v. John Gilbert Laier, decided November 8, 1943 by St. Sure, District Judge, Northern District of California, No. 28036-S.

Quoting from the last mentioned case by Judge St. Sure:

> "Admittedly, the local board failed to comply with these provisions, and the effect of such failure would seem to be that the registrant was not classified at all, nor could he legally be inducted, at the time it made its order. In issuing its order, the board acted entirely outside its jurisdiction and without any legal authority."

To the same effect see *Olm v. Perkins,* 79 Fed. (2d) 533.

In still another respect there was a failure of the board to follow the regulations set up to govern its action in determining appellant's status as a minister. It failed to follow Opinion 14 of Selective Service (see pages 99 to 104 of transcript for full text of this regulation) in that the board made no effort to determine the relationship between appellant and other members of Jehovah's Witnesses nor whether such other members regarded him as a minister and when appellant appeared for his hearing the board made no effort to ascertain such facts. Yet these things are required specifically by this regulation. The failure to follow such regulation was fatal to the classification. See *Olm v. Perkins,* supra.

From the foregoing appellant submits that the evidence was insufficient to support a conviction and that his motion for a directed verdict of acquittal should have been granted.

II. THE COURT ERRED IN GIVING TO THE JURY, OVER DEFENDANT'S OBJECTION, AN INSTRUCTION THAT "IN CLASS I-A SHALL BE PLACED EVERY REGISTRANT WHO IS FOUND AVAILABLE FOR GENERAL MILITARY SERVICE, AND SUCH REGISTRANT SHALL BE LIABLE FOR INDUCTION INTO THE ARMED FORCES OF THE UNITED STATES". (Assignment of Error III, Tr. p. 125.)

THE COURT ERRED IN GIVING TO THE JURY, OVER DEFENDANT'S OBJECTION, THE FOLLOWING INSTRUCTION: "I INSTRUCT YOU THAT THE LOCAL BOARDS, UNDER RULES AND REGULATIONS PRESCRIBED BY THE PRESIDENT SHALL HAVE POWER, WITHIN THEIR RESPECTIVE JURISDICTIONS TO HEAR AND DETERMINE, SUBJECT TO THE RIGHT TO APPEAL TO APPEAL BOARDS THEREIN AUTHORIZED ALL QUESTIONS OF CLAIMS WITH RESPECT TO INCLUSION FOR OR EXEMPTION FOR DEFERMENT FROM TRAINING AND SERVICE UNDER THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, OF ALL INDIVIDUALS WITHIN THE JURISDICTION OF SUCH LOCAL BOARD. THE DECISION OF SUCH LOCAL BOARD SHALL BE FINAL EXCEPT WHERE AN APPEAL IS AUTHORIZED IN ACCORDANCE WITH SUCH RULES AND REGULATIONS AS THE PRESIDENT MAY PRESCRIBE". (Assignment of Error IV, Tr. pp. 125 and 126.)

THE COURT ERRED IN GIVING TO THE JURY, OVER DEFENDANT'S OBJECTION, THE FOLLOWING INSTRUCTION: "I INSTRUCT YOU THAT EACH BOARD OF APPEALS SHALL HAVE JURISDICTION TO REVIEW ANY DECISION CONCERNING CLASSIFICATION OF THE REGISTRANT BY ANY LOCAL BOARD IN THE AREA OF THE BOARD OF APPEALS, PROVIDED SUCH AN APPEAL HAS BEEN FILED WITH THE LOCAL BOARD. SUCH APPEAL MUST BE TAKEN WITHIN 10 DAYS AFTER THE DATE WHEN THE LOCAL BOARD MAILS TO THE REGISTRANT NOTICE OF CLASSIFICATION, AND THE DECISION OF THE BOARD OF APPEALS SHALL BE FINAL UNLESS MODIFIED OR REVERSED BY THE PRESIDENT". (Assignment of Error V, Tr. p. 126.)

THE COURT ERRED IN REFUSING TO GIVE TO THE JURY AN INSTRUCTION THAT: "IF YOU FIND OR HAVE REA-

SONABLE DOUBT AS TO WHETHER THE DRAFT BOARD ACTED ARBITRARILY AND CAPRICIOUSLY AND FAILED TO ACCORD THE DEFENDANT A HEARING UPON HIS APPLICATION FOR DEFERMENT AS A REGULAR MINISTER OF RELIGION IN ACCORDANCE WITH SECTION 625.2 OF THE SELECTIVE SERVICE REGULATIONS THEN YOU SHOULD ACQUIT THE DEFENDANT". (Assignment of Error VIII, Tr. pp. 127 and 128.)

These assignments III, IV, V and VIII are so related and intertwined that it seems proper to consider them together.

The evidence showed that uncontradicted proof had been submitted to the draft board establishing the claim of appellant that he was a minister of religion; the evidence further showed that the draft board had ignored all of this evidence and in the teeth of it had classified appellant in Class I-A. There was thus substantial evidence before the jury tending to prove arbitrary and capricious action on the part of the draft board, which action would in law vitiate the board's decision. There was also before the jury substantial evidence tending to show that the draft board had failed to accord appellant the personal hearing provided for by the regulations, and which failure resulted in a failure of due process.

Assignment VIII was intended to instruct the jury on both these vital questions of arbitrary action and the failure to accord a hearing and ought to have been given. The effect of the failure to give this instruction, taken in connection with the instructions referred to in assignments III, IV and V, was to take entirely from the jury the whole question of arbitrary and

capricious action on the part of the board and the further question of the failure of due process by reason of the failure to accord a personal hearing.

Angelus v. Sullivan, supra;
Johnson v. United States, supra;
Yamatoya v. Fisher, supra;
U. S. v. John Gilbert Laier, supra.

III. THE COURT ERRED IN GIVING TO THE JURY, OVER DEFENDANT'S OBJECTION, AN INSTRUCTION THAT: "YOU AS JURORS ARE NOT TO DECIDE WHETHER THE DEFENDANT IS OR IS NOT A MINISTER OF RELIGION. WHAT YOU ARE TO DETERMINE IS WHETHER THE DEFENDANT AFTER CLASSIFICATION INTENTIONALLY IGNORED THE DRAFT BOARD'S ORDER TO REPORT FOR INDUCTION". (Assignment of Error VI, Tr. p. 127.)

THE COURT ERRED IN REFUSING TO GIVE TO THE JURY AN INSTRUCTION THAT IF THE JURY FOUND THAT DEFENDANT WAS A REGULAR MINISTER OF RELIGION THEN IT SHOULD ACQUIT THE DEFENDANT. (Assignment of Error VII, Tr. p. 127.)

Both of these assignments relate to the question of the exemption of ministers from service in the armed forces. Under Section 5 (d) of the Selective Training and Service Act of 1940, regular or duly ordained ministers are exempt from training and service. Being so exempt, the draft board was without authority to order a minister to report for induction into the armed forces, and the question, therefore, of whether appellant was or was not a minister should have been submitted to the jury.

This question should also have gone to the jury on the basis of appellant's claim that the draft board had

proceeded against him in an arbitrary and capricious manner in denying his claim as a minister. Before the jury could decide whether the board's action was arbitrary and capricious it would have to decide of necessity that the appellant was in fact a minister. The instruction covered in assignment VI should therefore not have been given and the proposed instruction covered by assignment VII should have been given.

IV. THE COURT ERRED IN REFUSING TO GIVE TO THE JURY AN INSTRUCTION THAT IF THE JURY FOUND THAT THE DRAFT BOARD FAILED TO COMPLY WITH OPINION 14 OF THE NATIONAL DIRECTOR OF SELECTIVE SERVICE, IN CLASSIFYING DEFENDANT, THEN IT SHOULD ACQUIT THE DEFENDANT. (Assignment of Error IX, Tr. p. 128.)

This opinion is a regulation of the Selective Service System made especially applicable to Jehovah's Witnesses. Such regulations have the force of law. *Olm v. Perkins,* supra. And a failure to follow such regulation by the administrative agency results in an unfair hearing, which will be nullified by the Court. See *Olm v. Perkins,* supra.

This opinion reads, in part, as follows:

> 1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognizes as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc.

By their adherence to the organization of this religious corporation, the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

3. * * * Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the work of teaching the tenets of their religion and in the converting of others to their belief. A certified official list of members of the Bethel Family and Pioneers is being transmitted to the State Directors of Selective Service by National Headquarters of the Selective Service System simultaneously with the release of this amended Opinion. The members of the Bethel Family and pioneers whose names appear upon such certified official list come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended and they may be classified in Class IV-D. The status of members of the Bethel family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion.

5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand

in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses, as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

The evidence showed that the draft board made no attempt to follow this regulation. It made no attempt to determine whether or not appellant was regarded by other Jehovah's Witnesses in the same manner in which regular or ordained ministers of other religions are ordinarily regarded. Appellant had submitted his ordination certificate and a long statement in support of his claim. (Tr. pp. 46, 66-67, 35.) Finally he came before the board for a personal hearing, at which time it would be assumed that the board would attempt to ascertain the facts in accordance with this Opinion 14. Instead no question whatever is asked appellant as to his relationship with other Jehovah's Witnesses, but he is merely asked

as to whether or not he wished to appeal. (Tr. pp. 91-93.)

In view of this state of the record, appellant was entitled to have submitted to the jury the question as to whether or not the board had complied with the regulation and that if the jury found that it had not, then appellant was entitled to an acquittal. *Olm v. Perkins,* supra.

CONCLUSION.

It is respectfully submitted that by reason of the errors herein set forth, the conviction of the appellant should be reversed.

Dated, Oakland, California,
January 14, 1944.

Respectfully submitted,
CLARENCE E. RUST,
Attorney for Appellant.